

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
MILWAUKEE DIVISION

DEAN ANDERSEN,,
Plaintiff,

Case No.: 2:13-cv-867-PJG

v.

HARRIS & HARRIS, LTD.,
Defendant.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT AND CROSS MOTION FOR SUMMARY JUDGMENT**

Defendant, Harris & Harris, Ltd. ("Harris"), by and through its attorneys, David M. Schultz and Justin M. Penn, and for its Response to plaintiff's motion for summary judgment and cross motion for summary judgment, states as follows:

1. The facts in this case are simple, straightforward, and undisputed.
2. Dean Andersen opened an account with We Energies. Dean Andersen supplied his cell phone number to We Energies in relation to the account.
3. Dean Andersen failed to pay We Energies, and We Energies forwarded the debt to Harris to collect. We Energies provided plaintiff's phone number to Harris, and Harris called Dean Andersen.
4. Despite numerous phone calls, Dean Andersen and Harris spoke only one time with respect to the We Energies debt. In that call, Dean Andersen requested Harris

not call his cell phone, which request Harris honored and never called him again on his cell phone.

5. The FCC has issued a Declaratory Ruling explaining that when an individual provides his cell number to the creditor, a debt collector collecting on behalf of the creditor has prior express consent to call the debtor using an autodialer and prerecorded messages. *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC Declaratory Ruling No. 07-232, 23 FCC Rcd. 559 ¶ 9-10.

6. A debtor cannot either cannot revoke that consent (*Saunders v. NCO Fin. Sys.*, 910 F.Supp.2d 464 (E.D.N.Y. 2012) *Chavez v. The Advantage Group*, 2013 WL 4011006, *4 (D.Colo. Aug. 5, 2013)), or if it can be revoked, it must be revoked in writing (*Kenny v. Mercantile Adjustment Bureau, LLC*, 2013 WL 1855782 (W.D.N.Y. May 1, 2013)).

5. Under either circumstance, Dean Andersen's use of an outgoing automated voice message in response to previously consented to unattended calls does not effectively revoke consent.

6. Harris asserted in its Second Affirmative Defense that Dean Andersen provided his cell number to We Energies, and that Harris therefore had prior express consent to call the cell number. Harris is entitled to judgment on its Second Affirmative Defense.

7. In addition, Dean Andersen failed to disclose any evidence as to an injury in fact. He also stipulated at his deposition that he has not incurred any injury in fact.

8. Harris asserted in its Fifth Affirmative Defense that Dean Andersen lacks standing because he did not incur an injury in fact. Harris is entitled to judgment on its Fifth Affirmative Defense.

9. Alternatively, and in the event Harris's motion for summary judgment is denied, Dean Andersen's motion for summary judgment should also be denied.

10. Harris incorporates the arguments made in its contemporaneously filed Brief Supporting Cross Motion for Summary Judgment and Response to Plaintiff's Motion for Summary Judgment.

WHEREFORE, defendant, Harris & Harris, Ltd., respectfully requests that this Court enter judgment in its favor on plaintiff's claims, enter judgment in its favor on its Second Affirmative Defense for prior express consent, enter judgment in its favor on its Fifth Affirmative Defense for lack of standing, and enter judgment against plaintiff on his Verified Complaint, and for any other relief this Court deems fair and just. In the

alternative, defendant respectfully requests that this Court deny plaintiff's motion for summary judgment, and for any other relief this Court deems fair and just.

Dated at Chicago, Illinois this 3rd day of April 2013.

/s/ Justin M. Penn

Justin M. Penn

Illinois State Bar No. 6283726

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CERTIFICATE OF SERVICE

I, an attorney, hereby certify that on April 3, 2014, I electronically filed Defendant's Response to Plaintiff's Motion for Summary Judgment and Cross Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/Justin M. Penn

Justin M. Penn